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No. 264

In the  
**Supreme Court of the United States**  
OCTOBER TERM 1963

JAMES P. DONOVAN, *et. al.*,  
*Petitioners,*  
*v.*  
CITY OF DALLAS, *et. al.*,  
*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI**

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**JURISDICTION**

No substantial federal question is presented in this case and therefore no jurisdiction exists to review the decision of the Supreme Court of Texas entered March 13, 1963, in *City of Dallas, et al v. Honorable Dick Dixon, et al*, nor the contempt judgment of the Court of Civil Appeals entered May 22, 1963, in *City of Dallas, et al v. Brown, et al* and *James P. Donovan, Atty. Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, and *Arizona v. California*, 283 U. S. 423.

No jurisdiction, original or appellate, exists in this Court to review the actions of the United States District Court in dismissing *Brown, et al v. City of Dallas, et al* (pp. 55a and 56a App. to Petition) and the action of the court in dismissing *Donovan, et al v. Supreme Court of Texas, et al* (p. 57a, App. of Petition). 28 U. S. C. A., Sec. 1291; Sec. 1251-1257 incl.

The question of whether the Supreme Court of Texas has original or appellate jurisdiction over the actions of the Texas Court of Civil Appeals, an inferior court, presents no federal question.

The judgment of the Court of Civil Appeals which held Petitioners in contempt of court for disobedience of the orders of that Court issued to enforce its judgment in the case of *Atkinson v. City of Dallas*, 353 S. W. 2d 275, and in which this Court denied a Writ of Certiorari, 8 L. Ed. 2d 808, is not based upon any federal ground as none of the grounds set forth in Rule 19 of the United States Supreme Court Rules as a requisite to the jurisdiction of this Court, is presented by the petition.

### QUESTIONS PRESENTED

Petitioners state (pp. 5 and 6 of Petition) that there are eight questions presented in this case. Respondents believe that the questions presented in this case are simply these:

- (1) Does this Court have jurisdiction to review the constitutional and statutory jurisdiction of the Texas Supreme Court, either appellate or original, over the

actions of the Texas Court of Civil Appeals, which is an inferior court in the Texas Judiciary?

(2) May the Texas Court of Civil Appeals hold in contempt the attorney and parties litigant before it after according due process as follows:

(a) Issued an injunctive and prohibitory order as required by the Supreme Court of Texas;

(b) Given notice of this order by mail to all the parties and the attorney representing them;

(c) As conclusive evidence of all parties having due notice of this order, the attorney in his own name and other parties litigant, filed Civil Cause styled *James P. Donovan et al v. Supreme Court of Texas et al* in the United States District Court to enjoin the Supreme Court and the Court of Civil Appeals from enforcing the injunction and prohibitive orders.

(d) After application made, issuing and serving on each party a show cause order to show why they should not be held in contempt;

(e) After making appearance on his own behalf and other parties litigant, the Attorney made application for a continuance of the hearing on the show cause order in the contempt proceedings. This motion was granted and an additional seven days were allowed.

(f) Held a full hearing in which each party was present in person or by attorney, and at which



each was given an opportunity to show why he was not in contempt, but each refused to testify on advice of counsel, who did testify?

(3) May the Texas Court of Civil Appeals issue an injunction against parties litigant before it to restrain and prohibit them from prosecuting a subsequently filed suit in Federal Court which the Supreme Court of Texas has ruled sought to litigate the same issues as had already been decided by the Texas Court and which amounted to vexatious and harassing litigation?

(4) May the United States District Court, after notice of appeal has been given, but the case has not been docketed in the Circuit Court of Appeals, dismiss the appeal on motion of the appellants?

### STATEMENT OF THE CASE

The per curiam opinion of the Court of Civil Appeals in the contempt proceedings (368 S. W. 2d 240 and also appearing at pp. 27a through 37a inclusive of the Appendix to Petitioners' Application for Writ of Certiorari) correctly states and reviews the history of this extensive and prolonged litigation.

Following the judgment of the Court of Civil Appeals holding the Petitioners in contempt and assessing penalties and ordering the imprisonment of the attorney, the attorney on two occasions applied for a writ of habeas corpus to the Supreme Court of Texas to be released. On both occasions the Supreme Court of Texas declined to do so. On the day following the action of the Supreme Court, Attorney Dono-



van applied to one of the judges for the United States District Court for the Northern District of Texas for similar relief, which was likewise denied. Thereafter Donovan applied for a writ of habeas corpus to the United States Circuit Court of Appeals for the Fifth Circuit for similar relief, which appears as No. 450 - Misc. In the Matter of: James P. Donovan, on Habeas Corpus, and on May 30, 1963, that Court entered the following order:

"Before HUTCHESON, GEWIN and BELL, Circuit Judges.

"BY THE COURT:

"Pursuant to the provisions of Title 28 U.S.C.A., Section 2241(b), each of the Judges composing this Court declines to entertain an application for writ of habeas corpus, and the said writ is hereby, DENIED."

The record of the Contempt Proceedings before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in this cause consists of 238 pages. The hearing started on May 20, 1963. At the start of the hearing the Court checked the appearance of each party, documented evidence was produced together with oral testimony, and Petitioner Donovan testified beginning at page 207 through page 223.

At the conclusion of this evidence the Court took the case under advisement, and delivered its findings and judgment on May 22, 1963, at which time the petitioners and their attorney were present. The testimony given by Donovan is reflected in the Court's Per Curiam Opinion which is part of this record. A reading of that testimony and his argu-

ments which are reported as part of the record and the statements made in this Petition, particularly at the bottom of page 16 and top of page 17 (which are outside of the record) bespeak his attitude toward the Courts.

Petitioners take the position that the *Atkinson* case did not litigate the validity of the prior outstanding airport revenue bonds of the City of Dallas as none of the bondholders were parties to the *Atkinson* suit. This ground is untenable because the existence of the prior outstanding bonds was then an established fact at the time of the filing of the *Atkinson* suit and Petitioners (litigants in that case) and in their capacity, could have and should have litigated all matters dealing with the questions raised, and particularly the validity of the statute under which these bonds and the prior bonds were issued.

Petitioners also state that the injunction by the Texas Court of Civil Appeals denies to them the right to have the plea of res judicata determined in the Federal Court. This matter was taken care of by the opinion of the Supreme Court of Texas in *City of Dallas et al. v. Honorable Dick Dixon et al.*, 365 S. W. 2d 919, wherein the Court stated:

"All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed against the plaintiffs by the judgment of the Court of Civil Appeals affirming summary judgment against them in *Atkinson v. City of Dallas*. \* \* \*"

There is one thing that is extremely pertinent to this type of law suit that distinguishes it from all other types of law suits: The issuance and sale of the bonds do not depend on whether or not the case can be successfully litigated. The mere filing of the case itself prevents the issuance of the bonds regardless of the merits of such a law suit.

# I.

**No substantial Federal question is raised by the Petition.**

Petitioners state that a Federal decision closely paralleling this action is the case of *Supreme Tribe B-H v. Cauble*, 235 U. S. 356, 65 L. Ed. 673, 41 S. Ct. 338, which was reversed by the Court in *Toucey v. N. Y. Life Insurance Co.*, 62 S. Ct. 139, 314 U. S. 118, 86 L. Ed. 100.

However, it should be remembered (and Petitioners failed to call the Court's attention to the fact) that the U. S. Statute (28 U. S. C. A. 2283 which was the basis of the *Toucey* decision) was subsequently amended by the Congress and the effect of this amendment was to nullify the decision and the footnote to the Statute so states. *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp.*, 244 F. 2d 394; *Southern California Petroleum Corp. v. Harper*, 273 F. 2d 715.

Petitioners claim they have been denied their civil rights in that they were not allowed an opportunity to vote upon the issuance of the revenue bonds. The Texas Constitution does not require as a prerequisite to the issuance of revenue bonds, that the proposition be submitted to the otherwise qualified voters. The matter of whether or not bonds (either

general obligation or revenue bonds) can or cannot be issued by a city like Dallas with or without a vote of the qualified voters, is wholly statutory. See *Art. 701, 1925 Rev. Civ. Stats., of Texas. Moller v. City of Galveston, 57 S. W. 1116.*

Since the Texas Constitution does not grant to Petitioners the right of franchise on the question of whether revenue bonds can be issued then Petitioners' claim that they were denied their civil rights of franchise by issuing the bonds without an election is wholly unfounded.

Revenue bonds are not a debt under the Texas Constitution and their validity has been sustained by the Texas Supreme Court. *City of Dayton v. Allred, 123 Tex. 60. Atkinson v. City of Dallas, 353 S. W. 2d 275; Writ of Cert. denied 8 L. Ed. 2d 808; Rehearing Denied, 9 L. Ed. 2d 92.*

Since the Texas Supreme Court has sustained the validity of the revenue bonds, no Federal question is presented. *Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188; 58 S. Ct. 50.*

Petitioners further complain that they were denied the right to litigate the revenue bond issue of Love Field under *Title 15 U. S. C., Sec. 77q* and *Title 15 U. S. C. Sec. 77v(a)* on the grounds of misrepresentation. Pleadings in the Federal Court case show that they attempted to litigate them as taxpayers and property owners. However, these Statutes are for the benefit of a good-faith purchaser of the bonds and not for a taxpayer. *Texas Continental Life Ins. Co. v. Bakers Bond Co., 187 F. Sup. 14, and Birnbaum v. Newport Steel Corp., 193 F. 2d 461.*

## II.

**The Action of the Texas Supreme Court was wholly  
within its Constitutional and Statutory  
Jurisdiction.**

The Texas Supreme Court had ample constitutional and statutory authority to grant the writ of mandamus in which it ordered the Court of Civil Appeals to enforce the judgment in the case of *Atkinson v. City of Dallas*. It was so held in *G.C. & S.F. Ry. Co. v. Muse*, 109 Tex. 352, where the Supreme Court construed its jurisdiction, both appellate and original, as follows:

"Section 3 of article 5 of the Constitution authorized the Legislature to 'confer original jurisdiction on the Supreme Court, to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the state.' Under that authority the Legislature has conferred on this court original jurisdiction to issue writs of mandamus, 'agreeable to the principles of law, regulating such writs against any district judge or Court of Civil Appeals or judge of the Court of Civil Appeals, or officer of the state government, except the Governor of the state.' Vernon's Ann. Civ. St. Supp. 1918, art. 1526, Rev. St.

"It is inconceivable, in view of the express language of this article and the respective jurisdictions of the Supreme Court and of the Courts of Civil Appeals, that it was ever intended by the Legislature that this court should be precluded from granting full relief to one whom it found entitled to the writ of mandamus, under the law governing that writ, by reason of a contrary opinion of the Court of Civil Appeals. While the acts of those courts, under the authority conferred by article 1595 are entitled to, and will always receive, our utmost consideration, they cannot control the exercise of this

court's original jurisdiction; and, of course, when a judgment is pronounced in the exercise of that jurisdiction, all writs necessary for its enforcement may be issued. *Pickle v. McCall*, 86 Tex. 212, 24 S. W. 265; *Hovey v. Shepherd*, 105 Tex. 237, 147, S. W. 224."

The judgment of the Court of Civil Appeals in declining to grant the writ of prohibition in the case of *City of Dallas v. Brown et al.*, 362 S. W. 2d 372, although not reviewable by the Supreme Court by appeal was not final, but was subject to review by the Supreme Court of Texas in an original mandamus proceedings. *Dallas Ry. & Terminal Co. v. Watkins*, 126 Tex. 116.

Furthermore, the Supreme Court of Texas, under the Constitution and the statutes, has the power and authority to direct the Court of Civil Appeals to set aside and vacate its orders and perform the acts directed by the Supreme Court. *Cleveland v. Ward*, 116 Tex. 1. In spite of these decisions and the settled law on this question, Petitioners insist that the Supreme Court lacks this power and authority. Such misconception was the reason why Petitioners and their attorney were found guilty of contempt.

### III.

**The Texas Court of Civil Appeals had full jurisdiction over the parties in the Contempt Proceedings and any Irregularities were waived.**

The Petitioners in their questions presented complain of what they term irregularities in the Contempt Proceedings. However, the record shows that all parties had notice of the



injunction and writ of prohibition mailed to them." Subsequent to this mailing, they held a meeting in which their attorney Donovan advised them as to their rights under this order and told them that they did not have to obey it. (S. F. 211-212.) Later the Court issued a show cause order and this order was personally served on all of the Petitioners including the Attorney Donovan, by the Deputy Sheriff of the County. Attorney Donovan appeared in Court representing all the parties, listed their names and asked for a continuance of the hearing. He was granted a delay of seven days. At the time of the hearing, the Court called the roll and checked each and every person to see that he was present either in person or by attorney (S. F. p. 15 et seq.) On advice of their Attorney Donovan, all of the parties refused to take the stand and show cause why they should not be held in contempt. (S. F. p. 199.) Only Attorney Donovan took the stand in their behalf and stated that their actions had been on his advice, that he told them to disregard the injunctive orders of the Court of Civil Appeals, and that they with knowledge then proceeded in the Federal Courts. (S. F. pp. 207-210.) Under the adjudicated cases, if there was any defect in the notice to show cause or service thereof, the above proceeding constitutes an effective waiver.

Even if no writ were served upon the Petitioners or if no writ were even issued, so long as the Court's pronouncement was brought to their knowledge and they answer it was sufficient. *Ex parte Stone*, 72 S.W. 1000.



The service of any formal summons is waived if the party appears in court and announces ready. *Ex parte Haubelt*, 57 Tex. Cr. R. 512.

If the parties show by their evidence that they understand what the injunction or writ means and what it prohibits them from doing, it is of no importance that it does not conform to the statute. *Ex parte Young*, 103 Tex. 470; *Ex parte Testard*, 102 Tex. 287.

#### IV.

**A State Court having acquired jurisdiction of the parties may enjoin them from prosecuting a suit in the Federal Court involving the same Subject Matter.**

A state court having acquired jurisdiction of the parties and the subject matter of the litigation, has the authority to enjoin the attorney and parties to the state court proceedings, from subsequently instituting or prosecuting a suit in the Federal Court involving the same subject matter. *Princess Lida v. Thompson*, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285; *Blanchard v. Commonwealth Oil Co.*, 294 F. 2d 834. headnote 11; *Moton v. Hull*, 77 Tex. 80. It is academic that a state court will not enjoin a Federal Court in proceeding with a case over which the state court has acquired prior jurisdiction. However, there is a vast difference between an attempt of the state court to enjoin the Federal Court from proceeding with the trial of a case as opposed to the state court enjoining the litigants from proceeding with the prosecution of the suit.

## V.

**A Federal District Court may dismiss an appeal from its action upon motion of the Appellants before the appeal has been docketed.**

So long as an appeal has not been docketed on the docket of the Circuit Court of Appeals, the District Court may dismiss the appeal upon motion of the Appellants. Rule 73(a), Federal Rules of Civil Procedure; *United States v. Mass. Bonding & Ins. Co.*, 303 F. 2d 823, headnote 6.

**CONCLUSION**

The decision of the Supreme Court of Texas in *City of Dallas v. Dixon et al* (365 S. W. 2d 919); the Per Curiam Opinion of the Court of Civil Appeals (368 S. W. 2d 240) and the judgments of dismissal by the United States District Judge in the cause styled *Brown et al v. City of Dallas*, and *Donovan et al v. Texas Supreme Court*, are in all respects correct, and upon those opinions and for the foregoing reasons the Petition for Certiorari in this case should be denied.

Respectfully submitted,

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## APPENDIX

Art. 5, Section 3, Texas Constitution, provides as follows:

*"§ 3. Jurisdiction of Supreme Court; writs; sessions; clerk*

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction."

Art. 1826, Vernon's Ann. Civ. Stats of Texas, grants power to Courts of Civil Appeals to punish for contempt as follows:

"Art. 1826. 1594, 999 *May punish for contempt*

"They may punish any person for a contempt of said courts, not to exceed one thousand dollars fine or imprisonment not exceeding twenty days."

Art. 701, Revised Civil Statutes of Texas, provides as follows:

"Art. 701. [605] *Shall hold election*

"The bonds of a county or an incorporated city or town shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property tax payers of such county, city or town."